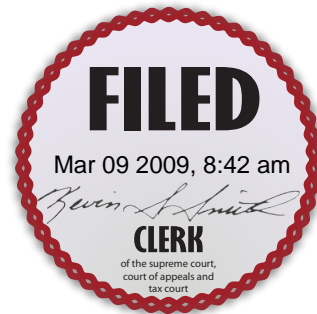


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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BR ASSOCIATES, INC.,  
Appellant-Defendant,

vs.

SONDRA J. NEAL,  
Appellee-Plaintiff.

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No. 54A01-0807-CV-350

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APPEAL FROM THE MONTGOMERY SUPERIOR COURT  
The Honorable David A. Ault, Judge  
Cause No. 54D01-0711-CT-388

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**March 9, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant BR Associates, Inc. (BR), appeals the trial court's order denying its motion to set aside a default judgment regarding a cause of action that appellee-plaintiff Sondra J. Neal had filed against it for sexual harassment. Specifically, BR contends that the evidence presented "was more than sufficient to establish the existence of a mistake or excusable neglect due to a breakdown in communications between BR and its former counsel." Appellant's Br. p. 11. Moreover, BR argues that the trial court erred in imputing BR's counsel's neglect to it and that the trial court erred in determining that it waived its right to arbitration. Thus, BR requests that we reverse and order the trial court to stay further proceedings pending arbitration. Concluding that the trial court should have granted BR's motion to set aside the default judgment, we reverse and remand. On remand, the trial court shall stay further proceedings pending arbitration.

### FACTS

On February 22, 2006, Neal began employment as a cook at the Long John Silvers restaurant in Crawfordsville. Prior to commencing employment at the restaurant, Neal signed a "Dispute Resolution Agreement & Receipt" which provided, among other things, that

In signing this Agreement, both the Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute. . . . Legally protected rights covered by this Arbitration Agreement are all legal claims, including . . . claims for wrongful termination . . . ; [and] sexual harassment.

Appellant's App. p. 190.

During a ten-month period, a co-employee—Ramsey Shonk—allegedly touched Neal in sexually inappropriate ways. According to Neal, Shonk’s touchings were non-consensual and unwanted. Another coworker witnessed Shonk’s conduct and described Neal’s reaction to it as “a mixture of anger and fear.” Appellant’s App. p. 70-71.

At some point, Neal reported Shonk’s inappropriate conduct to the managers at Long John Silvers. Thereafter, personnel from BR, the corporate owner of Long John Silvers, conducted an internal investigation of the alleged occurrences. Neal also reported the incidents to the Crawfordsville Police Department. During the investigation, other employees at Long John Silvers submitted written statements that contradicted Neal’s claims. As a result, Neal was terminated from Long John Silvers in December 2006, for making a false statement to her employers. The police department also closed its investigation.

Thereafter, Neal sought unemployment benefits following her termination of employment. An administrative law judge subsequently determined that her employment was terminated without just cause. Neal also contacted an investigator with the Crawfordsville Police Department and reported that the employees at Long John Silvers had been coerced into giving the statements that contradicted her sexual harassment claims. Thus, in November 2007, the police department reopened the investigation.

According to Neal, the manager at Long John Silvers called a meeting and informed all of the employees that their jobs would be in jeopardy if they corroborated Neal’s claims. One of the employees subsequently recanted his statement that

contradicted Neal's claims. The employee gave a detailed statement to detective Rick Wilson of the Crawfordsville Police Department, indicating that his previous statement was not true because the managers told him that he could be fired if he supported Neal's claims. The employee also believed that he would be incarcerated if he lost his job because child support enforcement proceedings were pending against him.

At some point, Neal filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). The EEOC subsequently closed its file on Neal's complaint against BR based on its inability to conclude that the information obtained established a violation of the statutes. On November 21, 2007, Neal filed a complaint against BR in the trial court. When BR failed to answer the complaint, Neal requested and obtained a default judgment against BR on December 17, 2007. Thereafter, the trial court conducted a damages hearing. Counsel for BR did not attend the hearing, and the trial court awarded Neal damages totaling \$121,264.

On March 6, 2008, BR moved to set aside the default judgment on the basis of excusable neglect that stemmed from a breakdown in communication between BR and its former counsel. Following a hearing, the trial court denied BR's motion to set aside the default judgment. The trial court's order, which sets forth additional facts, provided as follows:

#### FACTS

Defendant was served with process by the mailing of summons and complaint to defendant's registered agent. Defendant received the summons and complaint on November 23, 2007. Defendant's representatives met with counsel on November 29, 2007, to deliver the suit papers for this case and two others. Defendant's counsel believed that

defendant had been served on November 26 or 27, and calendared this case to file an answer on December 19 or 20.

On December 17, 2007, plaintiff obtained a default judgment against defendant. A hearing on damages was scheduled for January 28, 2007. Counsel for defendants did not enter their appearance until January 25, 2008, when defendant's motion to continue the damages hearing was granted. The hearing was rescheduled to February 20, 2008.

On February 20, 2008, defendant filed another motion to continue the hearing, which was transmitted to the Court by facsimile on the day of the hearing. The Court denied defendant's motion. Defendant's counsel did not appear for the hearing. The Court heard the evidence and awarded a judgment for plaintiff.

...

On March 10, 2008, defendant filed its motion to stay execution of judgment and motion to set aside default judgment. The court stayed execution conditioned on defendant filing an appeal bond. Defendant timely filed its bond.

The Court heard evidence and argument of counsel on June 12, 2008, and took the motion to set aside default judgment under advisement.

### SERVICE OF PROCESS

Plaintiff served defendant with a summons and copy of her complaint sent by certified mail to the defendant's registered agent. . . . The mail was received by an employee other than the designated resident agent. Defendant's argument that service was therefore deficient has previously been rejected.

Defendant argues that service was defective because the address on the summons, "4201 A. Mannheim Road," varied from the correct address of the corporation and its registered agent, "4201 Mannheim Road, Suite A." Plaintiff responds that Trial Rule 4.15 (F) resolves this issue by providing that no summons or service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him. Although the address on the summons varies from the nominally "correct" address, the difference is both practically and legally insignificant. Defendant unquestionably was informed of this action upon actual receipt of the summons at its offices. The Court had personal jurisdiction of defendant upon service of the summons.

### T.R. 60(B)(1) MISTAKE OR EXCUSABLE NEGLIGENCE

This is not a case of miscommunication between client and counsel. It is a case of neglect, by both client and counsel. The issue then becomes whether the neglect of either is excusable, such that relief under Trial Rule 60(B)(1) may be given.

Defendant was neglectful in failing to record the date of service, charged with the knowledge that it could be defaulted 24 days later. Defendant was not unfamiliar with litigation, as its director of human resources testified that when plaintiff's complaint was received, a meeting had already been scheduled with counsel regarding suits in Vigo and Lake counties. This case was also given to counsel at that meeting, held November 29.

Defendant received notice of the December 17 default judgment from the Clerk by December 20, and then contacted its counsel to inform him of the default. Although defendant's counsel had calendared this matter for a responsive pleading by December 20, counsel did not file his appearance until January 25. The hearing on damages was continued on defendant's motion from January 28 to February 20, and the order granting the continuance was sent to counsel by facsimile on January 25.

Neither counsel for defendant nor any representative of defendant appeared at the February 20 hearing. Counsel for defendant sent a motion to continue the hearing by facsimile on that date, which was denied. The Court notified defendant's counsel by telephone that its motion had been denied. The Court heard plaintiff's evidence and entered a judgment for \$121,111 plus costs. On March 6, defendant filed its motion to set aside the default judgment—80 days after being defaulted and 112 days after counsel was engaged to defend the case.

...

The "mistake" urged by defendant as the basis for relief here is "confusion as to the dates and manner of service regarding three different lawsuits and the lack of company records documenting dates and manner of service of process. . . ." Such "confusion" could have easily been dispelled by timely and reasonable attention to or inquiry into the operative facts by both defendant and its attorney. That they neglected to do so does not rise to the level of excusable neglect.

#### T.R. 60(B)(6)—VOID JUDGMENT

Defendant's reply brief . . . raises as an additional basis for relief under Trial Rule 60(B)[(6)] that the default judgment is void because the parties had agreed to arbitrate the type of claims plaintiff has asserted, and this Court therefore did not have jurisdiction over the plaintiff's claims.

Defendant introduced into evidence a "Dispute Resolution & Receipt," which provides that defendant and its employees agree to submit

all legal claims to binding arbitration. Assuming for purposes of defendant's motion that there is an enforceable arbitration agreement and that it encompasses the claims plaintiff has asserted, the Court must then determine whether defendant waived its right to arbitration.

Although a written agreement to submit a dispute to arbitration is valid and enforceable, the right to require such arbitration may be waived by the parties. Such a waiver need not be in express terms and may be implied by the acts, omissions or conduct of the parties.

...

The defendant has failed to timely assert its right to arbitration, thereby placing it in the same posture of attempting to excuse or justify its conduct as it has done with respect to its Trial rule 60(B)(1) contentions. Whether defendant's conduct is characterized as an omission or acting inconsistently with its right to arbitrate, the result is unchanged. Defendant has simply failed to preserve its rights in accordance with the basic procedures for the orderly administration and disposition of disputes. Accordingly, defendant is not entitled to relief under Trial Rule 60(B)(6).

Appellant's App. p. 7-15. BR now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

We initially observe that default judgments are not favored in Indiana. Shane v. Home Depot USA, Inc., 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007). Although the decision to grant or deny a motion to set aside a default judgment falls within the trial court's discretion, that discretion must be exercised in light of the strong public policy in Indiana that favors deciding cases on their merits. Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001).

Relief from a default judgment is merited if the defaulted party establishes that a mistake, surprise, or excusable neglect led to entry of the default judgment and is able to demonstrate the existence of a meritorious defense to the defaulted claims. Flying J Inc. v. Jeter, 720 N.E.2d 1247, 1250 (Ind. Ct. App. 1999); Ind. Trial Rule 60(B). Any doubt

as to the propriety of a default judgment is to be resolved in favor of the defaulted party. Pitts v. Johnson County Dep't of Pub. Welfare, 491 N.E.2d 1013, 1015 (Ind. Ct. App. 1986). Moreover, any considerations of judicial economy created by affirming a default judgment must yield to considerations of justice. Walker v. Kelley, 819 N.E.2d 832, 839 (Ind. Ct. App. 2004).

## II. Mistake and Excusable Neglect

In determining whether miscommunication between BR personnel and its former counsel constituted a mistake or excusable neglect under Trial Rule 60(B), we note that our Supreme Court has determined that a breakdown in communication between counsel and client that leads to a party's failure to timely answer a complaint or appear in court constitutes "excusable neglect." Whittaker v. Dail, 584 N.E.2d 1084, 1087 (Ind. 1992). A trial court will be held to have abused its discretion in refusing to set aside a default judgment where credible evidence establishes that such miscommunication results in a litigant's failure to appear. Id.

In this case, the record establishes that a meeting was held on November 29, 2008, involving BR personnel and attorney Michael Owen. The BR representatives—all non-lawyers—believed that they had provided Owen with all of the information necessary to defend against Neal's claims. However, Owen left the meeting with a misunderstanding of the date by which he was required to answer Neal's complaint. Appellant's App. p. 145. Owen realized the error, took responsibility for missing the deadline, and acknowledged that the error was the result of the miscommunication. Id. at 312-59.

There is nothing in the record indicating that BR had “dragged its feet” or engaged in any other dilatory conduct that would merit an entry of a default judgment. Indeed, three business days after it received Neal’s complaint, BR retained Owen—an experienced attorney—to defend against the claims. Hence, the misunderstanding between BR and its counsel amounted to an inadvertent and innocent error. And the trial court acknowledged in its order that “defendant’s evidence shows that defendant promptly communicated with its attorney and placed the summons and complaint in its attorney’s hands less than a week after receipt from the Clerk.” Id. at 10.

In accordance with the affidavits presented with BR’s motion to set aside the default judgment and the testimony presented at the June 12, 2008, hearing on the motion, it is clear that BR representatives did not misinform Owen as to when it received the summons and complaint. Instead, the evidence established that BR’s representatives correctly indicated to Owen that they were uncertain when those documents had been received. Id. at 160-69.

In light of these circumstances, we must conclude that the trial court erred in characterizing this misunderstanding as stemming from misinformation that was provided by BR personnel. See Ind. Dep’t of Natural Res. v. Van Keppel, 583 N.E.2d 161, 163 (Ind. Ct. App. 1991) (holding that although the defendant’s failure to file was due to its own internal error of repeatedly transferring the complaint to the wrong legal department, such bureaucratic errors “constitute a showing of the threshold requirement of a mistake under T.R. 60(B)(1)”); see also Whittaker, 584 N.E.2d at 1087 (observing that where unchallenged credible testimony established a breakdown in communication that resulted

in a party's failure to appear for trial, the grounds for setting aside a default judgment, as specified in Indiana Trial Rule 60, were satisfied and the trial court should have set aside the default judgment).

Notwithstanding the above, Neal directs us to Smith v. Johnston, 711 N.E.2d 1259 (Ind. 1999), in support of her position that that the trial court's denial of the motion to set aside the default judgment should stand because "each BR Associates person who touched the papers chose to disregard the clear dictates of the summons and had to accept the risk of adverse consequence." Appellee's Br. p. 14. However, this court recently discussed the holding in Johnston as follows:

In support of their argument, the Shanes direct us to Smith v. Johnston, 711 N.E.2d 1259 (Ind. 1999). In that case, a doctor and his medical group were sued. When the summons arrived at the office, a scrub nurse who normally did not receive mail signed for the summons and placed it on the doctor's desk. The person who regularly received the mail and handled all legal matters for the office was in the process of leaving the group and was out of the office when the summons was delivered. The doctor did not open the summons until after a default judgment had been entered against him and his medical group. Our supreme court found that this breakdown in communication was "neglect, but not excusable neglect" because the defendants themselves failed to do what they were required to do, i.e., open the summons and notify their insurance company and/or counsel. Id. at 1262. Unlike in Whittaker and Flying J, in Smith, the failure to answer a complaint was not caused by a misunderstanding between defendants and their agents but rather was within defendants' own office.

Shane, 869 N.E.2d at 1236.

Unlike the circumstances in Smith, it is undisputed here that BR personnel opened the summons and timely contacted their legal counsel to defend it against Neal's complaint. Appellant's App. p. 319. Moreover, problems did not arise until after BR

retained and met with the company's counsel. As a result, Neal's reliance on the holding in Johnston is misplaced.

We also cannot agree with the trial court's decision to impute Owen's purported neglect of the matter to BR. In Rose v. Rose, 181 Ind. App. 98, 390 N.E.2d 1056 (1979), this court reversed the trial court's refusal to set aside a default judgment that was attributable to attorney error. In discussing that a default judgment attributable to attorney error is an exception to the general rule that the negligence of an attorney is imputed to a client, this court determined that

[W]e are compelled to conclude that the trial court abused its discretion in failing to set aside the default judgment. The facts above were uncontroverted and uncontested in the court below and are conceded by the parties on appeal. From our independent review of the record, we are left with the singular conviction that Donald was conscientious and diligent in his own right, but fell prey to unexplainable and inexcusable misfeasance and nonfeasance by the Kentucky attorney, Donald's retained counsel. In a case such as this, where the uncontradicted evidence discloses that the client exercised diligence but whose rights were forfeited by attorney misconduct, the latter's negligence should not be imputed to the client.

Id. at 100-101, 390 N.E.2d at 1058 (emphasis added).

As discussed above, BR retained Owen in a timely fashion and provided him with the information and documents that were available to it. Having done so, it was entirely reasonable for BR to rely upon Owen to fulfill his professional obligations and timely defend the company against Neal's complaint. As a result, we conclude that the trial court erred in imputing Owen's neglect to B.R., and BR has successfully demonstrated mistake or excusable neglect within the meaning of Trial Rule 60(B).

### III. Meritorious Defense

In addition to establishing the existence of a mistake, surprise, or excusable neglect, a party seeking to set aside a default judgment must also demonstrate that it possesses a meritorious defense to a plaintiff's claims. Watson, 747 N.E.2d at 548-49. A meritorious defense is one showing that, if the case was retried on the merits, a different result would probably be reached. Baxter v. State, 734 N.E.2d 642, 646 (Ind. Ct. App. 2000).

We also note that to establish a meritorious defense, a party need not prove the absolute existence of an undeniable defense. Bunch v. Himm, 879 N.E.2d 632, 637 (Ind. Ct. App. 2008). Rather, a defendant need only make a prima facie showing of a meritorious defense. Id. A prima facie showing is one that requires a litigant to present facts or evidence or legal presumptions that are sufficient to constitute a defense to a party's claims until disproven or rebutted. Shane, 869 N.E.2d at 1238.

In this case, BR contends that one of its defenses to Neal's sexual harassment claim is premised on the contract that Neal signed, in which she agreed to arbitrate her claims. As BR correctly observes, Indiana recognizes a strong policy favoring the enforcement of arbitration agreements. Harlow v. Parkevich, 868 N.E.2d 822, 826 (Ind. Ct. App. 2007). A party seeking to compel arbitration must satisfy a two-pronged burden of proof: the existence of an enforceable agreement to arbitrate the dispute and that the dispute is the type of claim the parties agreed to arbitrate. Norwood Promotional Prods., Inc. v. Roller, 867 N.E.2d 619, 623 (Ind. Ct. App. 2007), trans. denied. If the court is satisfied that the parties contracted to submit their dispute to arbitration, the court is required to compel arbitration. Id.; Ind. Code § 34-57-2-3(a). As discussed above, Neal

signed an agreement prior to commencing her employment with BR to submit claims—including those for sexual harassment—to arbitration. Appellant's App. p. 190.

Notwithstanding the existence of the agreement, Neal claims that BR waived its right to arbitrate the matter. Although a written agreement to submit a dispute to arbitration is valid and enforceable, the right to require such arbitration may be waived by the parties. Safety Nat'l Cas. Co. v. Cinergy Corp., 829 N.E.2d 986, 1004 Ind. Ct. App. 2005). Such a waiver need not be in express terms and may be implied by the acts, omissions or conduct of the parties. Id. Whether a party has waived the right to arbitration depends primarily upon whether that party has acted inconsistently with its right to arbitrate. Id. Waiver is a question of fact under the circumstances of each case. Id. In determining if waiver has occurred, courts look at a variety of factors, including the timing of the arbitration request, if dispositive motions have been filed, and/or if a litigant is unfairly manipulating the judicial system by attempting to obtain a second bite at the apple due to an unfavorable ruling in another forum. Id.

In this case, Neal elected to file a lawsuit in the trial court rather than proceed to arbitration in derogation of the agreement. This litigation is still in its infancy, and although BR has litigated the matter when necessary to protect its rights, it has not actively sought the trial court's ruling upon the substantive merits of the case. Indeed, of the two substantive filings that BR has submitted to the trial court—the motion to set aside the default judgment and the supplemental pleading pointing out the existence of the arbitration agreement—are clearly not the actions of a party seeking to waive arbitration. Moreover, it was Neal who brought BR into court when she contravened the

terms of the arbitration agreement. Finally, the record demonstrates that BR sought to arbitrate well in advance of discovery, dispositive motions, or trial that will occur if the default judgment is set aside. In light of these circumstances, we cannot say that the evidence established that BR waived its right to arbitrate.

In addition to the terms set forth in the arbitration agreement, we also note that BR's earlier investigation of Neal's accusations of sexual harassment provides it with compelling evidence that Neal is manufacturing her claims against the company in hopes of landing a windfall litigation award. Specifically, the contemporaneous statements taken by BR from Neal's co-workers undermine Neal's credibility. Appellant's App. p. 170-79. Although some of the co-workers, after being terminated by BR, have recanted their testimony, Neal apparently is unable to produce a co-worker or supervisor who has consistently maintained that she was sexually harassed. Id. Thus, for these additional reasons, we conclude that BR possesses sufficient evidence and facts necessary to present a meritorious defense. As a result, we reverse the trial court's judgment denying BR's motion to set aside the default judgment and remand this cause to the trial court. On remand, the trial court shall stay the proceedings pending arbitration in accordance with the terms of the agreement.

The judgment of the trial court is reversed and remanded with instructions.

NAJAM, J., and KIRSCH, J., concur.